

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 87-80-P-C
)	(Civil No. 95-410-P-C)
THOMAS OTIS EATON,)	
)	
Defendant)	

**RECOMMENDED DECISION ON DEFENDANT'S MOTION
FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255**

Thomas Otis Eaton moves this court to vacate his sentence pursuant to 28 U.S.C. § 2255. Eaton was convicted of possession with intent to distribute in excess of five hundred grams of a substance containing cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B) and 18 U.S.C. § 2; conspiracy to do the same in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846; and carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). Memorandum of Decision and Order (“Order”) (Docket No. 14). Eaton bases this motion on the United States Supreme Court’s recent decision in *Bailey v. United States*, 133 L.Ed.2d 472 (1995). I reject Eaton’s arguments and recommend that his motion be denied.

I. Background

Eaton was indicted, *inter alia*, for the offenses noted above on September 22, 1987. Indictment (Docket No. 1). The evidence at trial showed that: Eaton agreed to supply Tod Alexander with a kilogram of cocaine, which Alexander would sell to “Jim” (an undercover government informant) for \$45,000. *United States v. Eaton*, 890 F.2d 511, 511-12 (1st Cir. 1989), *cert. denied*,

495 U.S. 906 (1990). On September 15, 1987 Jim picked up Alexander and drove to the location where the sale was to occur. *Id.* at 512. Alexander walked to Eaton’s truck and returned to Jim’s car with a sample of cocaine. *Id.* Government agents who had been observing the area arrested Alexander. The agents then went to Eaton’s truck, ordered Eaton out, arrested him and removed a loaded semiautomatic pistol from under the driver’s side seat of the truck. *Id.*; Order at 10. Following a bench trial the court found, *inter alia*, that Eaton had carried a firearm during and in relation to a drug trafficking crime. Order at 12. Eaton was convicted on all three charges, and on May 13, 1988 he received three five-year prison sentences to be served consecutively. Judgment in a Criminal Case (Docket No. 15) at 1.

II. Legal Analysis

Eaton challenges the sentence imposed pursuant to 18 U.S.C. § 924(c)(1), which provides in relevant part: “Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years” Eaton relies primarily on the Supreme Court’s recent holding that “use” of a firearm under 18 U.S.C. § 924(c) denotes “active employment” of a firearm. *Bailey*, 133 L.Ed.2d at 484.¹ However, the trial court found Eaton guilty under section 924(c)(1) based on his carrying, rather than using, a firearm. Thus, I need not address Eaton’s argument that

¹ The government concedes that *Bailey* is applicable to collateral attacks under section 2255, and that it applies retroactively to convictions already final when the opinion was announced on December 6, 1995. Government’s Response to Motion to Vacate, Set Aside or Correct Sentence Filed Pursuant to Title 28, U.S.C., Section 2255 (Docket No. 39) at 14.

he did not “use” the firearm.²

Eaton argues that *Bailey* “appears to contemplate ‘carrying’ under 18 U.S.C. § 924(c)(1) in a sense of having the gun on the defendant’s person.” Memorandum in Support of Petitioner’s Motion to Vacate Conviction (Docket No. 37) at 4; *see Bailey*, 133 L.Ed.2d at 482 (keeping gun hidden in clothing throughout drug transaction cited as example of carrying without using). The First Circuit has already rejected this argument.

In *United States v. Ramirez-Ferrer*, ___ F.3d ___, 1996 WL 194961 (1st Cir. Apr. 29, 1996), the defendants were transporting a load of cocaine by boat. *Id.* at *1. United States Customs Service agents boarded the boat and discovered one defendant standing near a storage compartment. *Id.* The agents later discovered a loaded revolver behind that storage compartment, covered by a T-shirt. *Id.* There was no evidence that the defendants had any physical contact with the weapon. *Id.* at *4.

The First Circuit upheld the defendants’ convictions under the “carry” prong of section 924(c)(1), based on evidence that (1) they caused the firearm to be transported aboard the boat during their drug trafficking crime, and (2) the loaded firearm was within easy reach of one defendant.³ *Id.* at *5. Similarly, Eaton caused the firearm to be transported in his vehicle during his commission of drug trafficking crimes, and the loaded gun was within easy reach as he sat in the truck, beneath the

² I reject Eaton’s argument that, because Count III of the indictment charged that he did “use *and* carry” a firearm, Indictment at 2, the government had to prove that he both used and carried a firearm. Section 924(c)(1) criminalizes *either* the use *or* carrying of a firearm during and in connection with a drug trafficking crime. Merely charging Eaton under both prongs of section 924(c)(1) did not require the government to prove both. *See Bailey*, 133 L.Ed.2d at 485 (where defendants were charged under both “use” and “carry” prongs of section 924(c)(1), but “use” prong was not satisfied, Court remanded case for consideration of “carry” prong as basis for upholding conviction).

³ The court expressed no opinion on whether accessibility is a prerequisite to conviction under the “carry” prong of section 924(c)(1). *Ramirez-Ferrer*, ___ F.3d at ___, 1996 WL 194961, at *5.

driver's side of the seat. *See United States v. Nicholson*, 983 F.2d 983, 986, 990 (10th Cir. 1993) (loaded revolver under front seat of defendant's car was within easy reach, and thus supported conviction under "carry" prong of section 924(c)(1)). Accordingly, the trial court properly found that Eaton carried a firearm within the meaning of 18 U.S.C. § 924(c)(1).

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate his sentence be ***DENIED***.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of May, 1996.

*David M. Cohen
United States Magistrate Judge*